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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ROBERT PELTIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–19a) is reported at 500 F. 2d 985.

JURISDICTION

The *en banc* judgment of the court of appeals (Pet. App. 20a–21a) was entered on May 9, 1974. On June 3, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 8, 1974. The petition was filed on that date and was granted on November 11, 1974 (A. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, should be applied retroactively.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
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> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
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> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

2. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or

any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

On March 7, 1973, an indictment (A. 4) was returned in the United States District Court for the Southern District of California charging that respondent had knowingly and intentionally possessed, with intent to distribute, approximately 270 pounds of marihuana, in violation of 21 U.S.C. 841(a)(1). Respondent's subsequent motion to suppress evidence was denied after a hearing (A. 5–26). On May 17,

1973, after respondent waived his right to a jury trial, the case was submitted to the district court on the basis of stipulated facts (A. 27–28) and the transcript of the suppression hearing, and the court found respondent guilty as charged (A. 35). Respondent was sentenced to imprisonment for one year and one day, with immediate eligibility for parole pursuant to 18 U.S.C. 4208(a)(2), and to a special parole term of two years pursuant to 21 U.S.C. 841(b)(1)(B) (A. 37–38). The court of appeals, sitting *en banc,* reversed the judgment of conviction in a 7–6 decision and remanded the case to the district court with instructions to suppress the evidence seized in the search of respondent's automobile (Pet. App. 1a–19a).

1. It was stipulated at trial that respondent knowingly and intentionally possessed, with intent to distribute, the 270 pounds of marihuana that were discovered in his automobile by Border Patrol officers on February 28, 1973 (A. 28).[1] The facts surrounding the seizure of the marihuana were adduced at the suppression hearing through the testimony of the two Border Patrol officers who participated in the stop and search of respondent's vehicle. Respondent presented no evidence at the hearing.

Border Patrol Agent Charles Ainscoe testified that he and Agent William Pfiester were conducting a roving immigration patrol near Temecula, California, at

[1] The stipulation stated that it "would not [have been] entered into had the defendant's motion to suppress in the case been granted" (A. 28).

about 2:30 A.M. on February 28, 1973, when they observed respondent traveling north on Highway 395, approximately 70 air miles from the Mexican border (A. 6–7, 12).[2] The officers knew that the road was frequently used by smugglers to transport aliens who have entered the country illegally (A. 8), and their suspicions were aroused because respondent was driving an old model car and appeared to be of Mexican descent (A. 12, 16).[3] They therefore pursued and stopped respondent in order to inspect his vehicle for the presence of concealed aliens (A. 7–8).

As Agent Ainscoe approached the vehicle, he observed that it bore out-of-state license plates, that respondent was alone in the car, and that there were some clothes in the back seat (A. 7, 13). He informed respondent that he was conducting a "routine immigration inspection," and he asked respondent to open the trunk of the car (A. 7–8). As respondent unlocked the trunk, Ainscoe observed that the key had attached to it a tag like those frequently used for rental vehicles (A. 8).

When the trunk was opened, the officer could see several suitcases and several plastic garbage bags (A. 8–9). The plastic bags appeared to the officer to contain kilo-size, rectangular bricks of marihuana (A.

[2] When the officers observed him, respondent was approximately a mile and a half north of the fixed immigration checkpoint at Temecula, which was not in operation at the time (A. 7).

[3] The district court found that, while respondent "apparently * * * is of French extraction based upon his name, he does look to be dark-skinned and at night, that could easily be the case, that he would appear to be of Mexican descent" (A. 23).

9–10). "[T]hey were full of marihuana kilos, and they were pretty easily seen, they weren't symmetrical, the edges were sticking out every which way" (A. 9). Ainscoe had seen marihuana bricks on 20 or 30 prior occasions, including instances when the bricks had been packed in plastic garbage bags (A. 10). As he reached into the back of the trunk to inspect the bags, the officer detected the odor of marihuana (A. 10–11), which he had previously smelled "dozens of times" (A. 15–16). He then tore open the bags and discovered the marihuana that respondent was charged with possessing (A. 10–11, 24).

2. In his motion papers and at the suppression hearing, which preceded this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, respondent conceded that existing case law supported the Border Patrol's authority to stop and search vehicles for aliens without a warrant or probable cause. He argued, however, that, when the officer saw that the trunk contained no aliens, his authority ended and he could conduct a further search only if he had probable cause to do so. Respondent claimed that the officer's observation of the plastic garbage bags did not give him probable cause to believe that they contained contraband.

The district court denied the motion to suppress. It found that, in light of the officer's "experience in his job," he had probable cause to inspect the garbage bags "even before he smelled the marihuana, when he saw these protruding objects which, to him, resembled brick-shaped objects of marihuana" (A. 25).

3. On appeal, the government acknowledged and the court of appeals stated (Pet. App. 2a) that the search and seizure in this case was similar to the one declared unlawful by this Court in *Almeida-Sanchez.* We argued, however, that the ruling should not be applied retroactively to searches conducted prior to June 21, 1973, the date of the decision in that case.

A divided court of appeals, sitting *en banc,* nonetheless held that the rule of *Almeida-Sanchez* "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (Pet. App. 1a).[4] The majority concluded that the question of retroactivity was not truly presented, because *Almeida-Sanchez* "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (*id.* at 5a). The court conceded that several of its own pre-*Almeida-Sanchez* opinions since 1961, upholding the validity of warrantless *checkpoint* searches for aliens, "contain some dicta from which the government might infer that this court would uphold a roving-patrol search" (*id.* at 6a, n. 3). It also acknowledged that it had expressly held in 1970 that "government agents on roving patrol can stop and search automobiles without either probable cause or warrant" (*id.* at 6a). *United States* v. *Miranda,* 426 F. 2d 283.

The majority reasoned, however, that "our line of decisions, and that of the Court of Appeals for the Tenth Circuit * * *, permitting roving searches by

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[4] The court specifically reserved the question whether *Almeida-Sanchez* would apply in the case of a collateral attack upon a final conviction (Pet. App. 2a, n. 1).

the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court" (Pet. App. 7a). The court therefore concluded (*id.* at 9a):

> The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez,* not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.[5]

The six dissenting judges, noting that both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* recognized that the decision was a departure from the existing law in each of the three courts of appeals whose jurisdiction includes the Mexican border area (*id.* at 12a–13a),[6] concluded that, even under the

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[5] The court of appeals held in another *en banc* decision announced the same day as the present case (*United States* v. *Bowen*, 500 F. 2d 960, certiorari granted, October 15, 1974, No. 73–6848) that warrantless checkpoint searches, like roving patrol searches, violate the Fourth Amendment. It also held, however, that the exclusionary rule should be applied only to checkpoint searches conducted after this Court's decision in *Almeida-Sanchez*. The court of appeals stated in *Bowen* that, as applied to checkpoint searches, in contrast to roving patrol searches, *Almeida-Sanchez* "overrules clear past precedent, both statutory and case law," and "disrupts a practice long accepted and widely relied upon" (500 F. 2d at 977). We argue in *Bowen* and in *United States* v. *Ortiz*, No. 73–2050, that it was *Bowen*, not *Almeida-Sanchez*, that accomplished that result with respect to checkpoint searches in the Ninth Circuit.

[6] Mr. Justice Powell stated: "Roving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated

majority's standards, "the rule of *Almeida-Sanchez* is new" (*id.* at 13a) and the question of retroactivity must therefore be decided. The dissenting opinion reasoned that *Almeida-Sanchez* overruled established law, decisional as well as statutory,[7] concerning the Border Patrol's authority to conduct roving patrol checks of vehicles for aliens (*id.* at 13a–14a); that the prior law, though much of it was stated in dicta, had been "widely relied upon" (*id.* at 17a), and the "law enforcement practice, authorized for over a decade," had been "long accepted" (*id.* at 17a–18a); and that the result in *Almeida-Sanchez* "was not foreshadowed" (*id.* at 16a).

The dissenting judges therefore reached the question of retroactivity and, on the basis of the standards established by this Court in *Stovall* v. *Denno*, 388 U.S. 293, concluded that the deterrent purpose of the exclusionary rule would not be served by applying *Almeida-Sanchez* to roving patrol searches conducted prior to June 21, 1973 (Pet. App. 18a–19a).

The decision of the court of appeals in the present case is in conflict with the decision of the Fifth Circuit in *United States* v. *Miller*, 492 F. 2d 37, pending

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that the courts "have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today" (*id.* at 298).

[7] Under 8 U.S.C. 1357(a), immigration officers are given "power without warrant— * * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." By regulation, the term "reasonable distance" has been given an outside limit of "100 air miles from any external boundary" (8 C.F.R. 287.1(a)(2)).

on petition for a writ of certiorari, No. 73–6975, in which that court ruled, in harmony with the dissenting opinion in this case, that "*Almeida-Sanchez* announced a 'new rule'" overturning "an unbroken line of decisions by this Court" (492 F. 2d at 40, 41), that it established "a new exclusionary rule which law enforcement officials could not have foreseen" (*id.* at 41), and that it "should be given only prospective application" (*id.* at 42). The Fifth Circuit accordingly upheld a conviction based on evidence seized in a warrantless roving patrol search that occurred prior to this Court's decision in *Almeida-Sanchez*.[8]

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[8] *Miller* was decided by a three-judge panel, but the full court subsequently issued a unanimous *en banc* order in response to a petition for rehearing and suggestion for rehearing *en banc*. That order, dated July 8, 1974, is set forth as an appendix to the supplemental petition for a writ of certiorari pending before this Court in *Miller*. It stated: "The Court has considered the petition for rehearing *en banc* with respect to the retroactivity issue only, and is of the opinion that the decision of the panel is correct."

The Court of Appeals for the Tenth Circuit, though it has not decided the retroactivity of *Almeida-Sanchez* as applied to roving patrol searches, has held, incorrectly in our view, that the principles of that decision apply to checkpoint searches occurring prior to June 21, 1973, if the defendant preserved the issue at trial and on direct appeal. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court's reasoning—that one who has raised the issue and whose case was pending at the time of this Court's decision should "be given the same relief as has been afforded in *Almeida-Sanchez*" (485 F. 2d at 359)—would appear to extend to roving patrol searches as well.

ARGUMENT

THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ* SHOULD NOT BE APPLIED RETROACTIVELY TO EXCLUDE EVIDENCE SEIZED IN A ROVING PATROL SEARCH CONDUCTED PRIOR TO THE DATE OF THAT DECISION

A. INTRODUCTION AND SUMMARY

The focus in this case is on whether *Almeida-Sanchez* is the kind of decision that even raises a question of retroactivity. The threshold test applied by the court of appeals was drawn from Mr. Justice Stewart's dissenting opinion in *Milton* v. *Wainwright*, 407 U.S. 371, 381–382, n. 2: "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon * * *."[9]

The court of appeals concluded, in the context of the warrantless roving patrol search that was involved in the present case, that the decision in *Almeida-Sanchez* presents no retroactivity question, because it "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (Pet. App. 5a). By contrast, a different majority of the

[9] See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106: "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *."

same court ruled in *United States* v. *Bowen, supra,* that the decision in *Almeida-Sanchez* does present a retroactivity issue in the context of a warrantless *checkpoint* search of a vehicle for aliens and should be applied only prospectively to such searches.

The majority in the present case recognized that prior Ninth Circuit decisions upholding the lawfulness of warrantless checkpoint searches rested on a broad rationale that would apply equally to roving patrol searches. It discounted the significance of those decisions, however, on the ground that the opinions, insofar as roving patrol searches are concerned, were mere dicta. The court reasoned that, apart from its own decision in *Almeida-Sanchez,* it had specifically upheld a roving patrol search only once and only a few years before this Court decided *Almeida-Sanchez.* The court of appeals concluded that its two clear holdings prior to this Court's decision were of neither sufficient vintage nor, apparently, sufficient authority either to constitute clear past precedent for purposes of retroactivity analysis or to support the Border Patrol's long-established practice, in reliance upon express statutory authority, of conducting roving patrol searches of vehicles for aliens in the Mexican border area.

We argue that this Court's decision in *Almeida-Sanchez* "was a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) that departed from the prior administrative and judicial interpretation of the Border Patrol's statutory authority and overruled past precedent in the Ninth Circuit and elsewhere.

Since a legislative enactment "guides law enforcement personnel and courts until abrogated" (*United States* v. *Bowen, supra,* 500 F. 2d at 977), the Border Patrol would have been "entitled to rely on a presumptively valid * * * statute, enacted in good faith and by no means plainly unlawful" (*Lemon* v. *Kurtzman,* 411 U.S. 192, 209; plurality opinion), even if it had never been judicially tested. The statute authorizing warrantless searches of vehicles for aliens in the border areas, however, had been repeatedly tested, in the context of both checkpoint and roving patrol searches, and the courts of appeals, including the Ninth Circuit, had uniformly upheld the statute and its application.

Prior to this Court's decision in *Almeida-Sanchez,* no court had suggested that there might be a significant legal distinction between checkpoint and roving patrol searches. Decisions upholding checkpoint operations appeared to validate roving patrol operations as well. In any event, the Ninth Circuit specifically sustained a roving patrol search in 1970. One such decision by a court of appeals is enough, we submit, to constitute clear past precedent. The court of appeals' suggestion in the present case that a decision of this Court can present a question of retroactivity only if it overrules one of this Court's own prior decisions is contradicted by, for example, *Chevron Oil Co.* v. *Huson,* 404 U.S. 97.

By invalidating a warrantless roving patrol search of an automobile for concealed aliens, this Court's decision in *Almeida-Sanchez* not only overruled prior statutory and decisional law but also disrupted a long

accepted law enforcement practice that had been employed by the Border Patrol for many years in the area of this country's border with Mexico. Thus, under either of the criteria relied on by the court of appeals in the present case, the decision in *Almeida-Sanchez* presents a choice between retroactivity and non-retroactivity.

This Court's prior decisions make it clear how that choice should be exercised in the present case. As a new application of the Fourth Amendment's exclusionary rule, the decision in *Almeida-Sanchez* should be given prospective application only. The deterrent purpose of the exclusionary rule would not be furthered by applying it to pre-*Almeida-Sanchez* roving patrol searches conducted in good faith reliance on existing statutory and decisional authority.

B. *ALMEIDA-SANCHEZ* WAS A NEW APPLICATION OF THE EVIDENTIARY EXCLUSIONARY RULE; IT OVERRULED CLEAR PAST PRECEDENT IN THE COURTS OF APPEALS AND DISRUPTED AN IMMIGRATION LAW ENFORCEMENT PRACTICE LONG ACCEPTED AND WIDELY RELIED UPON IN THE MEXICAN BORDER AREA

The holding of the court of appeals in this case rests upon two erroneous premises. The first is that the overruling of past precedent raises a retroactivity question only when the past precedent consists of this Court's own decisions. The second is that two clear holdings by a court of appeals plus repeated statements in dicta concerning the validity of a particular law enforcement practice neither amount to clear past precedent nor provide a basis upon which law enforcement officers may reasonably rely in the exercise of their official responsibilities.

1. The validity of a warrantless roving patrol search of a vehicle was addressed by this Court for the first time in *Almeida-Sanchez*. Though the Court ruled that such a search is unlawful in the absence of particularized probable cause or reasonable suspicion focused on the automobile to be searched, the decision marked a departure from the established law in each of the courts of appeals whose jurisdiction includes the area of this country's border with Mexico.

The Border Patrol has conducted warrantless, routine, immigration inspections of vehicles for concealed aliens in the border areas, both by roving patrols and at traffic checkpoints, for nearly 50 years. The practice was expressly authorized by Congress in 1946 (60 Stat. 865) in legislation that empowered immigration officers, within a reasonable distance from an external boundary, to search any vehicle for aliens without a warrant and without individualized probable cause or suspicion. The language of that enactment, with some modification, was carried forward in Section 287(a)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a)(3), which provides that immigration officers "shall have power without warrant—* * * (3) within a reasonable distance from any external boundary of the United States, to * * * search for aliens any * * * vehicle * * *." It is in accordance with the authority conferred by that section, as implemented by pub-

lished regulations (8 C.F.R. 287.1),[10] that the Border Patrol conducted its checkpoint and roving patrol traffic checking operations prior to *Almeida-Sanchez*.

Decisions of the Fifth, Ninth, and Tenth Circuits repeatedly and uniformly sustained the constitutionality of the statute and the reasonableness of stops and limited searches of vehicles for aliens conducted pursuant to the authority conferred by the statute.[11] Although most of the decisions involved stops and searches at fixed immigration checkpoints, several involved stops and searches by Border Patrol officers conducting roving patrol traffic checking operations.

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[10] The regulations define "reasonable distance" as "within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director" (8 C.F.R. 287.1(a)(2)).

[11] Fifth Circuit: *Kelly* v. *United States*, 197 F. 162; *Haerr* v. *United States*, 240 F. 2d 533; *Ramirez* v. *United States*, 263 F. 2d 385; *United States* v. *Maggard*, 451 F. 2d 502; *United States* v. *Bird*, 456 F. 2d 1023, certiorari denied, 413 U.S. 919; *United States* v. *DeLeon*, 462 F. 2d 170, certiorari denied, 414 U.S. 853; *United States* v. *McDaniel*, 463 F. 2d 129, certiorari denied, 413 U.S. 919; *United States* v. *Wright*, 476 F. 2d 1027.

Ninth Circuit: *Fernandez* v. *United States*, 321 F. 2d 283; *Barba-Reyes* v. *United States*, 387 F. 2d 91; *United States* v. *Elder*, 425 F. 2d 1002; *United States* v. *Miranda*, 426 F. 2d 283; *United States* v. *Avey*, 428 F. 2d 1159, certiorari denied, 400 U.S. 903; *Fumagalli* v. *United States*, 429 F. 2d 1011; *United States* v. *Sanchez-Mata*, 429 F. 2d 1391; *Duprez* v. *United States*, 435 F. 2d 1276; *United States* v. *Marin*, 444 F. 2d 86; *United States* v. *Almeida-Sanchez*, 452 F. 2d 459, reversed, 413 U.S. 266; *Mienke* v. *United States*, 452 F. 2d 1076; *United States* v. *Foerster*, 455 F. 2d 981, vacated and remanded, 413 U.S. 915; *United States* v. *Aranda*, 457 F. 2d 761.

Tenth Circuit: *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206; *United States* v. *McCormick*, 468 F. 2d 68, certiorari denied, 410 U.S. 927; *United States* v. *Anderson*, 468 F. 2d 1280.

In *United States* v. *Miranda,* 426 F. 2d 283 (C.A. 9), for example, a Border Patrol officer on roving patrol stopped a car near the San Clemente checkpoint on Interstate Route 5 about 60 to 70 miles north of the Mexican border. Searching for concealed aliens, the officer looked under the hood of the car. He found no aliens, but he did discover marihuana in the fender wells. The Ninth Circuit, relying on its prior decisions involving checkpoint searches, held that the "regulation, and the statute upon which it is based, * * * are not unconstitutional *per se,* or as applied in this case" (426 F. 2d at 284). Since "the search here in question was made within a reasonable distance of both the American-Mexican boundary and the Pacific Ocean seashore boundary," the officer had "authority under 8 U.S.C. § 1357 to search defendant's automobile without a warrant to determine if aliens were hidden therein" (*ibid.*). "It was only after the car had been lawfully stopped and the hood lawfully opened for this purpose that [the officer] detected the marihuana" (*ibid.*).

Similarly, the Ninth Circuit in *Almeida-Sanchez* sustained a roving patrol search conducted about 25 air miles north of the Mexican border. It stated: "This court has approved the right of Immigration Officers acting under 8 U.S.C. § 1357, 8 C.F.R. § 287.1, to stop and investigate vehicles for concealed aliens within a hundred air miles from any external boundary without a showing of probable cause. * * * Since the

initial search under the rear seat of appellant's automobile was confined to a place where an alien might be concealed, the search was reasonable in scope" (452 F. 2d at 460–461). See also *Kelly* v. *United States,* 197 F. 2d 162 (C.A. 5), upholding a stop and search of a vehicle after it made a U-turn several hundred yards south of a checkpoint in Florida, and *Roa-Rodriquez* v. *United States,* 410 F. 2d 1206 (C.A. 10), holding that a stop and initial search of a vehicle for aliens, conducted near a checkpoint about 90 miles from the border in New Mexico, were lawful, although the search ultimately exceeded its proper scope.

Moreover, the decisions upholding stops and searches for aliens did not distinguish between checkpoint and roving patrol searches. Those involving checkpoints, like those involving roving patrols, were rested broadly upon "the right to stop and investigate vehicles for concealed aliens without a showing of probable cause" (*Duprez* v. *United States,* 435 F. 2d 1276, 1277 (C.A. 9); see also the Ninth Circuit's opinion in *Almeida-Sanchez,* 452 F. 2d at 460–461, quoted above).

Although we now argue in *United States* v. *Ortiz,* No. 73–2050, and *Bowen* v. *United States,* No. 73–6848, that checkpoint searches are significantly different from roving patrol searches insofar as the need for a warrant is concerned, those differences were first given significance by this Court's decision in *Almeida-Sanchez* and particularly Mr. Justice Powell's concurring opinion in that case. Until then, neither the government nor the courts had perceived any constitutionally significant distinction between a stop and search for aliens at a checkpoint and a stop and

search for aliens by a roving patrol. Thus, as the majority of the court of appeals in the present case acknowledged, its opinions sustaining checkpoint searches "do contain some dicta from which the government might infer that this court would uphold a roving-patrol search so long as it was conducted within the 100-mile area defined in 8 C.F.R. § 287.1" (Pet. App. 6a, n. 3).

Both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* explicitly recognized that the decision was a break with the established law in the courts of appeals. Mr. Justice Powell stated that, "[w]hile the question is one of first impression in this Court," "[r]oving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated that it "has been the consistent view" of the Ninth Circuit that, "under [8 U.S.C.] § 1357(a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant" (*id.* at 295). Moreover, both the Fifth and the Tenth Circuits "agree with the Ninth Circuit that § 1357(a)(3) is not void and that there are recurring circumstances where, as the statute permits, a stop of an automobile without warrant or probable cause and a search of it for aliens are constitutionally permissible" (*id.* at 296).[12]

[12] Mr. Justice White observed that, "in the 20 court of appeals cases I have noted, including the one before us, 35 different judges of the three courts of appeals found inspection

2. We therefore submit that *Almeida-Sanchez* "was a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) that presents a choice between retroactivity and non-retroactivity. The 1946 statute, reenacted in 1952, giving immigration officers the power to search vehicles for aliens within a reasonable distance from an external boundary, and the repeated judicial approval both of the statute and of the Border Patrol's exercise of the authority conferred by the statute, constituted "clear past precedent" (*Chevron Oil Co.* v. *Huson, supra,* 404 U.S. at 106), which this Court overruled in *Almeida-Sanchez* with respect to warrantless roving patrol searches.

a. A judicial invalidation of even a previously "untested" statute may be a sufficient break with the past to pose a retroactivity issue. In *Lemon* v. *Kurtzman,* 411 U.S. 192, this Court refused to give retroactive effect to its decision in *Lemon* v. *Kurtzman,* 403 U.S. 602, which had invalidated under the Establishment Clause of the First Amendment a state statutory program to reimburse non-public sectarian schools for certain secular educational services. The appellants had argued that "any reliance whatever by the schools [on the state statute] was unjustified because [the Act] was an 'untested' state statute whose validity had never been authoritatively determined" (411 U.S. at 207).

The plurality opinion responded, however, that "governments must act if they are to fulfill their high

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of vehicles for illegal aliens without warrant or probable cause to be constitutional. Only one judge has expressed a different view" (413 U.S. at 298–299, n. 10).

responsibilities" (*ibid.*), and "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (*id.* at 199).

Just as the state officials in *Lemon* were "entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful" (*id.* at 209), so should federal officials be entitled to rely on a presumptively valid Act of Congress giving law enforcement officers the authority to conduct limited searches without warrants in specified circumstances. In neither case should the officials be required either to "stay their hands" pending judicial ratification or to "risk draconian, retrospective decrees should the legislation fall" (*id.* at 207). As a majority of the Ninth Circuit stated in *United States* v. *Bowen, supra,* "a legally enacted statute becomes law until it is vitiated by a court decision"; it "guides law enforcement personnel and courts until abrogated" (500 F. 2d at 977). "Prior statutory law should be treated no differently from prior case law" (*ibid.*).

The statute here was not declared unconstitutional in *Almeida-Sanchez.* It was, instead, construed "in a manner consistent with the Fourth Amendment" (413 U.S. at 272). The majority of the court of appeals in the present case stated that "[j]udicial interpretation of a statute and departmental regulation to eliminate conflict with the Fourth Amendment hardly qualifies as the kind of 'new' constitutional rule sufficient to deny an appellant the fruits of his appeal" (Pet. App.

9a). We submit, however, that it should make no difference for purposes of retroactivity analysis whether the statute "falls" because it is declared unconstitutional or because it is construed in a way that eliminates constitutional problems but departs from the prior administrative interpretation.[13]

When the official conduct has been based upon a reasonable reading of a statute that was enacted in good faith and is not plainly unlawful, a judicial reinterpretation of the statute to avoid a constitutional infirmity should have no greater retrospective effect than a declaration of unconstitutionality. The ruling may be equally disruptive regardless of the form it takes. In either case retrospective application would "disturb or * * * attach legal consequence to patterns of conduct" that were predicated upon "a different understanding" of the law than "the rule that ultimately prevailed" (*Lemon* v. *Kurtzman, supra,* 411 U.S. at 198, plurality opinion).

b. The ruling in *Almeida-Sanchez,* however, was not simply an interpretation of previously untested legislation. The statute had been tested repeatedly in the courts of appeals, and those courts uniformly sustained the constitutionality of the statute both on its face and as applied by the Border Patrol in circumstances like those involved in this case. The decision in *Almeida-Sanchez* thus overruled a substantial body of case law in the courts of appeals, including the Ninth Circuit.

[13] This Court has already held that a new interpretation of a statute by the Supreme Court that overturns prior lower court interpretations can raise a retroactivity issue. *Chevron Oil Co.* v. *Huson, supra.*

The majority of the court of appeals in the present case thought it was significant that the Ninth Circuit had specifically upheld a roving patrol search, as opposed to a checkpoint search, in only one other case prior to its decision in *Almeida-Sanchez* (Pet. App. 6a and n. 3).[14] As we have shown, however, neither the Ninth Circuit nor any other court had suggested that there might be a constitutionally significant distinction between roving patrol and checkpoint searches, and the rationale of the Ninth Circuit's checkpoint search decisions extended as well to roving patrol searches.

In determining whether a decision has overruled past precedent, one should frame the inquiry with an eye to the "fact[s] of legal life" (*Lemon* v. *Kurtzman, supra,* 411 U.S. at 199, plurality opinion). Dicta in judicial opinions, particularly dicta that appear at the time to be holdings, are clearly among the "hard facts on which people must rely in making decisions and in shaping their conduct" (*ibid.*). Whether a decision presents a retroactivity issue should not depend, therefore, on whether prior judicial statements can be classified, with hindsight and upon a close legal analysis, as dicta rather than holdings. The niceties of *stare decisis* play little part in the planning of official conduct and should be similarly deemphasized in retroactivity analysis.

Moreover, we are unaware of any retroactivity decision that has turned on the *number* of cases that were

[14] This is, indeed, the only basis for distinguishing the result in the instant case from the contrary result in *Bowen*.

overruled. Is the law of a circuit to be viewed as in doubt because an issue has been squarely decided only once or twice? How many times must the court repeat its prior holdings before the law qualifies as past precedent for retroactivity purposes? We submit that one clear holding is enough. If it is overruled, a retroactivity issue is presented.

Nor should it make a difference that the decision "enjoyed only brief acceptance" (Pet. App. 7a) before it was overruled. What matters is whether the overruling was a departure from prior law that was not clearly foreshadowed. Whether prior law had been "accepted" for three years or thirty years may bear on the impact of applying the new rule retroactively and therefore may be relevant in deciding whether to give the rule retrospective effect. But it is the existence, not the age, of prior law that determines whether a retroactivity issue is presented.

That distinction is reflected in the threshold test relied upon by the majority of the court of appeals in this case (see p. 11, *supra*). A retroactivity issue is presented if a decision "overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon" (*Milton* v. *Wainwright, supra,* 407 U.S. at 381–382, n. 2, Mr. Justice Stewart dissenting). According to that test, it is the "practice," not the "past precedent," that must be "long accepted"; and disruption of "a practice long accepted" is an alternative to the overruling of past precedent. In either event the new decision would present a choice between retroactive and non-retroactive application.

c. The majority of the court of appeals reasoned, however, that "[a] Supreme Court decision overruling state or circuit decisions" does not raise a retroactivity issue unless it also "mark[s] a departure from prior decisions of the Supreme Court" (Pet. App. 10a). We submit that this Court's decisions are to the contrary. They establish, as the dissent stated in this case (Pet. App. 13a–14a) and as the majority of the Ninth Circuit stated in *Bowen*, that "the Supreme Court [need not] reverse itself in order for there to be an overruling of clear past precedent" (500 F. 2d at 976). A retroactivity issue may be presented if a decision of this Court overturns a line of lower court authority.

In *Chevron Oil Co.* v. *Huson, supra,* this Court declined to give retrospective effect to *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, where the result would have been to interpose an unanticipated time bar to a personal injury action. The Court reasoned that "*Rodrigue* was not only a case of first impression in this Court * * *, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at 107). When the injury occurred and the action was filed, "these Court of Appeals decisions represented the law governing [the plaintiff's] case" (*ibid.*). Since "[i]t cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned," the plaintiff was justified in "rely[ing] on the law as it then was" (*ibid.*). See also *Adams* v. *Illinois*, 405 U.S. 278, 283–284 (plurality opinion).

The decision in *Almeida-Sanchez*, like that in *Rodrigue*, "establish[ed] a new principle of law" (404 U.S. at 106) by overturning the consistent rulings of the Fifth, Ninth, and Tenth Circuits. It thereby "overrul[ed] clear past precedent" and "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" (*ibid.*).[15]

It is no answer to say, as the court of appeals said in the present case, that "[t]he Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration" (Pet. App. 9a). Although the majority of this Court in *Almeida-Sanchez* may have rested its decision upon established principles "never deviated from by the Supreme Court" (*ibid.*), the decision was a novel application of those principles that departed abruptly from the manner in which the courts of appeals had been applying the same principles to similar facts. As the Ninth Circuit stated in *Bowen, supra*, 500 F. 2d at 976, in re-

[15] *Robinson* v. *Neil*, 409 U.S. 505, relied upon by the majority of the court of appeals in the present case (Pet. App. 10a), is not to the contrary. *Robinson* gave retroactive effect to *Waller* v. *Florida*, 397 U.S. 387, which had barred on double jeopardy grounds successive municipal and state prosecutions for the same or a greater offense. The Court stated that "*Waller* cannot be said to have marked a departure from past decisions of this Court," and "the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases" (409 U.S. at 510). The issue that the Court was addressing in *Robinson*, however, was not whether *Waller* was or was not a new rule, but whether, *as* a new rule, it should or should not be applied retroactively. The decision thus fortifies rather than contradicts the holding in *Chevron*.

jecting the same argument that a different majority accepted in the present case:

> [L]aw enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule.

d. As we have shown, the practice of conducting warrantless searches of vehicles for aliens in the Mexican border area, both at checkpoints and on roving patrols, was followed by the Border Patrol for many decades as an integral part of its law enforcement program. The practice was expressly authorized by Congress in 1946 and was frequently upheld by the lower federal courts. Thus, *Almeida-Sanchez* not only "overrule[d] clear past precedent" in the courts of appeals but also "disrupt[ed] a practice long accepted and widely relied upon" (*Milton* v. *Wainright*, *supra*, 407 U.S. at 381–382, n. 2) as an important means of enforcing this country's immigration laws. The retroactivity inquiry is thus appropriate under each of the alternate criteria adduced in that formulation, either one of which would alone suffice to require the inquiry.

C. AS A NEW APPLICATION OF THE EVIDENTIARY EXCLUSIONARY RULE, DESIGNED TO DETER FUTURE VIOLATIONS OF THE FOURTH AMENDMENT, *ALMEIDA-SANCHEZ* SHOULD NOT BE GIVEN RETROSPECTIVE EFFECT

If, as we have argued, the decision in *Almeida-Sanchez* was a new application of the exclusionary rule and therefore presents an issue of retroactivity, this Court's prior decisions make it clear how that issue should be resolved. The decision should be given only prospective effect. *Linkletter* v. *Walker*, 381 U.S. 618; *Desist* v. *United States*, 394 U.S. 244; *Fuller* v. *Alaska*, 393 U.S. 80; *Williams* v. *United States*, 401 U.S. 646.

That is so because the "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved" (*Linkletter* v. *Walker, supra*, 381 U.S. at 637).

The retroactivity determination frequently depends not only on the purpose of the new rule but also on the extent to which law enforcement authorities reasonably relied upon the old standards and on the likely impact that retroactive application would have on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States, supra*, 394 U.S. at 249. This Court has relied heavily on those additional factors, however, "only when the purpose of the rule in question did not clearly favor either retroac-

tivity or prospectivity" (*id.* at 251). Because the exclusionary rule's "deterrent purpose * * * overwhelmingly supports nonretroactivity" (*ibid.*), the other factors are of only minimal significance in the present context.

We note, in any event, that, for the reasons we have recounted earlier in this brief, it was reasonable for the Border Patrol to rely upon the express authority conferred by statute, together with repeated and consistent judicial approval of routine searches of vehicles for aliens in the border areas. What the Ninth Circuit stated in *Bowen, supra,* with respect to the Border Patrol's operation of fixed checkpoints applies as well, we submit, to its operation of roving patrols (500 F. 2d at 979):

> [I]f the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified.

Roving patrol traffic checking operations were conducted in complete good faith, in the reasonable belief that they were lawful. Applying the exclusionary rule with respect to pre-*Almeida-Sanchez* searches conducted as part of such operations would not further the rule's deterrent purpose, which "necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right" (*Michigan* v. *Tucker,* No. 73-482, decided June 10, 1974, slip op. 13). It

would merely punish the government and the public, and frustrate the ends of the criminal justice system, because of "the reliance * * * placed, in good faith, on prior law" (*Wolff* v. *McDonnell,* No. 73–679, decided June 26, 1974, slip op. 32).

Moreover, applying *Almeida-Sanchez* retroactively, even if only to "cases pending on appeal on the date the Supreme Court's decision was announced" (Pet. App. 1a), would have a substantial impact upon the administration of justice. There are approximately 40 cases pending in the courts of appeals and a large number pending in the district courts that involve the validity of warrantless roving patrol searches of vehicles conducted prior to June 21, 1973. The outcome of each of those cases may be affected by the retroactive application of *Almeida-Sanchez.* Many more final convictions would be affected if the decision were also applied retroactively in the context of collateral attacks upon final convictions.[16]

Thus, the result is the same under each of the criteria that this Court has applied in determining the retroactivity or non-retroactivity of new rules or new

[16] The court of appeals expressly reserved judgment on that question. We note, however, that this Court has declined to recognize any distinction for retroactivity purposes between final convictions on the one hand and convictions at various stages of trial and direct appeal on the other hand. See, *e.g.*, *Stovall* v. *Denno*, *supra*, 388 U.S. at 300; *Desist* v. *United States*, *supra*, 394 U.S. at 253; *Williams* v. *United States*, *supra*, 401 U.S. at 651–652, 656–659 (plurality opinion); *Michigan* v. *Payne*, 412 U.S. 47, 57, n. 15.

applications of old rules: the decision in *Almeida-Sanchez* should be applied prospectively only.[17]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[17] The same result would follow, we submit, solely as a matter of exclusionary rule policy. See our brief in *United States* v. *Ortiz*, No. 73–2050, pp. 56–58.

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